IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-553

DOMINIC S. RINALDI

Petitioner,

v.

HOLT, RINEHART & WINSTON, INC. and JACK NEWFIELD

Respondents.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I N D E X

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I

RESPONDENT'S CONTENTION AS TO THE INACCURACY IN THE APPENDIX IS IN ITSELF DECEITFUL

The respondents deceitfully omit from their briefs that the petition herein stated at pages 43-44 that Holt's editor Wood had admitted in her moving affidavit that she had

read the April 9, 1974 article in the New York Times about the Association of the Bar Report which "she coupled with the statement that copies of the book whose publication date was April 15, 1974, had been released for sale some weeks before (Appendix FF,A274)". This clearly shows that the typing of "May" instead of "March" at A274 was plainly an error in transcription and that the petition had actually stated it to be some weeks before April 9, 1974, which would be in March,in citing A274, unfortunately not noticing the error in transcription of the Appendix. A reading of A274 itself indicates from the context of Wood's claim that this must be an error and that she was claiming a distribution of the book prior to April 9, 1974 and not after.

Respondent Holt's statement(brief, p.6) that Wood did not see the New York Times article of April 9, 1974 until after this action was commenced and has never seen a copy of the report, deceitfully omitted Wood's contrary admission above stated that she did see it (Appendix FF,A273) and that when Newfield obtained a copy of the Report on April 9, 1974, (Appendix DD, A250) Wood admitted that

he then told her of its conclusion that he had not substantiated his charges against petitioner (Appendix FF,A274).

There are other similar deceptions in Holt's brief. At page 11 it states that the Brooklyn Bar Association conclusion that Newfield's articles were false was that of one attorney, omitting the letters to Voice and New York Magazine of the Brooklyn Bar Association, signed by its President, that this was the conclusion of the Bar Association (Appendices S, T, A182,183). Also, at pages 11-12, Holt's brief states that Newfield corroborated Wood's statement that she had never seen the New York Times article of May 16, 1973, omitting to mention Newfield's sworn testimony on disclosure that "in May I showed her the article in the New York Times"."The only thing I gave Holt was the New York Times clipping about the filing of the suit" (Appendix DD, A245,246).

II

THE CONTENTION OF THE RESPONDENTS THAT THE CHARGES OF "SUSPICIOUS LENIENCY" AND "PROBABLY CORRUPT" ARE MERE PRIVILEGED OPINION IS UNTENABLE AS THE COURT BELOW CORRECTLY HELD

Newfield stated in the book that he

wrote three articles "detailing suspiciously lenient decisions by Justice Rinaldi. Two of these involved Mafia members Paul Vario and Sal Agro and a third involved a narcotics delaer named Clifton Glover" (Appendix F, A98). "I wrote four articles detailing cases in which Judge Rinaldi had acted suspiciously in ways that defied law and reason" (Appendix F, A100), and he testified on pre-trial disclosure that this charge was based on the Burton,Glover, Vario and Agro cases primarily and that when he wrote it he had no other cases in mind (Appendix CC, A242-243).

These are charges of "suspicious leniency"connoting venality and corruption in specific cases, the truth or falsity of which depends on the facts in those cases. At the time of the republication of the articles the respondents knew from the minutes in the four cases that the dispositions were on the consent and recommendation of the district attorney. Despite this, they republished the articles charging "suspicious leniency" in those cases.

The consents and recommendations of the district attorneys is what removes "suspicious" from "suspiciously lenient".

To retain it would require a finding that the inducing consents and recommendations of the district attorneys were "suspicous" and thus venal and corrupt. The respondents never made any such charge. For a judge to follow a recommendation of a district attorney may, in criticism, be said to be bad judgment, but it cannot be said to be "suspicious".

For the respondents to have republished the articles as originally written, despite their knowledge of the district attorneys'participation in the dispositions, is clearly evidence of malice as stated in Question "4" of the petition, as argued at pages 36-38 of the petition.

Even if these charges could conceivably be deemed an opinion, it is an opinion purported to be supported by the author's private knowledge, unknown to the reader, of the detailed facts in those four cases. In such a case, "the expression of an opinion becomes as damaging as an assertion of fact" Hotchner v. Doubleday & Company, Inc. (2 Cir) 551 F2d 910,913 (1977) cert den - U.S. October 4, 1977); AfroAmerican Publishing Co. v. Jaffe (D.C. Cir)366 F2d 649,655, (1965).

The listing of other claimed sources of support for these charges in Holt's brief (p.9) and Newfield's brief (pages 4-6) are with the exception of the indictment in Holt's recital, and the recital in Newfield's brief after April, 1973, the date of institution of the prior suit, alleged second-hand information upon which the publication of the original articles purported to be based which became irrelevant when prior to republication, the respondents, in the course of the prior action against Voice became aware in June to October, 1973, from the court records, of the actual facts in those four cases (Petition pages 25-29). Newfield's brief (pages 6-7) admits such acquired knowledge in the course of the prior case and Holt's answer in this case similarly so admits (Appendix G, A110-111).

As to the indictment, the petition herein, (pages 19-25) has demonstrated its complete lack of probative force to support the charge of "probably corrupt". The petition herein at page 23 did not say that the respondents used the words "probably guilty" as Holt claims at page 12 of its brief. The petitioner there

equated the charge of "probably corrupt" based solely on an indictment with a charge of "probably guilty" on the indictment, which is plainly so. If there is a distinction, it is a distinction without a difference.

III

THERE IS NO STATE LAW QUESTION IN THIS CASE

The respondent's defense to this action is that their publication was "privileged under the First and Fourteenth Amendments to the Constitution of the United States." (Appendix G,A109).

The Court below based its decision on what it deemed the compelling constraint of the decision of this Court in New York Times v. Sullivan, 376 U.S. 254 (Appendix C, A 6,21-22, 35-36, 38).

A summary judgment motion is a procedural motion to dismiss, which was granted by the Court of Appeals in its concluding paragraphs on the basis of its holding that petitioner had not made the showing of falsity and malice required by New York Times v. Sullivan, (Appendix C,A35-36).

IV

QUESTIONS "5" AND "6" OF THE PETITION AND PROPERLY BEFORE THIS COURT

Respondent Holt at pages 3 and 19 of its brief deceitfully states that these questions (petition pages 34-35, 39-41) were not considered or decided by the Court of Appeals, omitting to state that they were in fact raised by the petitioner in the Court of Appeals at pages 41 and 51 of his brief in that Court. These excerpts from the brief are annexed to this reply brief as Appendices 1 and 2.

Although the Court of Appeals did not discuss these questions raised by petitioner as the respondent in that Court as part of his showing of malice, it neccessarily, by its reversal, decided them against the petitioner. What is required in order to bring these questions to this Court is that they were raised below, which is the fact. (Street v. New York 394 U.S. 576,583, 22 1 ed 2d 572, 579-580).

As to Question "6", Holt's only answer is to state falsely(brief pages 3, 19) that this question "is addressed solely to respondent Newfield". Petitioner's

argument on this question (petition pages 34-35) is addressed specifically to Holt's editor Wood. Holt's false evasion of it as addressed solely to Newfield is a clear indication that it has no answer to it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted
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COUNSEL FOR PETITIONER

November 10, 1977

APPENDIX 1

EXCERPT FROM PAGES 41-42 OF PETITIONERS BRIEF IN COURT OF APPEALS

As to the charge that "Rinaldi is very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing" (A65), Newfield admitted that he had no specific cases in mind (RA58) and on his motion for summary judgment, he offered none. Nor did he offer the facts in any case to support the charge "cruel or abusive to defendants" (A68). As to the charge "Every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia" (A69) he has offered nothing to show that the plaintiff has such a reputation, or much less, that any law enforcement agency is "aware" of it. As to the charge that "the Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" (A69), Newfield has not shown from the

facts in any case that the disposition was "suspicious" (Guam Federation of Teachers v. Ysrael 492 F. 2d 438,439.

APPENDIX 2

EXCERPT FROM PAGES 51-52 of PETITIONERS BRIEF IN COURT OF APPEALS

Wood admits the she read Newfield's original article of August 31,1972 with the large headline "Justice Gets a Fix." A reading of the article makes it clear that there is nothing in the article to support or justify the headline and its criminal connotation of bribery or improper influence. The minutes (A197, 205) in the Burton and Glover cases referred to in that article, which minutes Holt had read as part of its "reliance" on plaintiff's examination before trial in the prior action, further clearly demonstrated the falsity and maliciousness of the headline. Newfield in his examination in the prior action had testified "In none of these articles do I allege corruption or venality" (RA56). "I have no evidence of corruption" (RA57). Yet, Holt placed the same headline "Justice Gets a Fix" on the article in the book in large type (p.98) knowing that it was a false and maliciously defamatory headline.

In Sprouse v. Clay Communications Inc. (Sup.Ct. of App. W.Va. 1975) 211 S.E. 2d 674, 686, cert. den. 423 U.S.882 46L. ed 2d 107, reh den. 46 L. ed 2d 311, the Court held:

> "Where oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headlines may be considered separately with regard to whether a known falsehood was published."

"Defamatory headlines are actionable even though the matter following is not, unless they fairly indicate the substance of the matter to which they refer" (Lawyers Co-Op Publishing Co. v. West Publishing Co. 32 App. Div. 585, 590; Vocational Guidance Manuals Inc. v. United Newspaper Manuals, Inc., supra, 280 App. Div. 593,595 affd.305 N.Y. 380; Rathkopf v. Walker,190 Misc. 168; Campbell v. New York Post 245 N. Y. 320, 328; Abrey v. World Telegram 7 Misc. 2d 413, 415.